

SECOND REGULAR SESSION

SENATE BILL NO. 1019

90TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR ROHRBACH.

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TERRY L. SPIELER, Secretary.

AN ACT

To repeal sections 375.1168, 375.1176 and 375.1182, RSMo 1994, relating to rehabilitation and liquidation of insurers, and to enact in lieu thereof three new sections relating to the same subject.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 375.1168, 375.1176 and 375.1182, RSMo 1994, are repealed and three new sections enacted in lieu thereof, to be known as sections 375.1168, 375.1176 and 375.1182, to read as follows:

375.1168. 1. The director as rehabilitator may appoint one or more special deputies, who shall have all the powers and responsibilities of the rehabilitator granted under this section, and the director may employ such counsel, clerks and assistants as deemed necessary, **except that no person shall be employed by the rehabilitator who is related within the second degree by blood or by marriage to the rehabilitator, special deputy rehabilitator, or to any member or employee of a law firm, consultant or other person receiving fees or other income from the insurer's assets. An attorney who serves as a special deputy rehabilitator may not also serve as counsel to the rehabilitator or to the company in rehabilitation. This restriction shall also apply to any law firm with which the special deputy rehabilitator is affiliated.** The compensation of the special deputy, counsel, clerks and assistants and all expenses of taking possession of the insurer and of conducting the proceedings shall be fixed by the director with the approval of the court and shall be paid out of the funds or assets of the insurer. The persons appointed under this section shall serve at the pleasure of the director. In the event that the property of the insurer does not contain sufficient cash or liquid assets to defray the costs incurred, the director may advance the costs so incurred out of any appropriation to the department for such purpose. Any amounts so advanced for expenses or

administration shall be repaid to the director out of the first available money of the insurer, and shall be paid by the director to the state treasurer for deposit to the general revenue fund.

2. The rehabilitator may take such action as he deems necessary or appropriate to reform and revitalize the insurer. He shall have all the powers of the directors, officers, and managers, whose authority shall be suspended, except as they are redelegated by the rehabilitator. He shall have full power to direct and manage, to hire and discharge employees subject to any contract rights they may have, and to deal with property and business of the insurer.

3. If it appears to the rehabilitator that there has been criminal or tortious conduct, or breach of any contractual or fiduciary obligation detrimental to the insurer by any officer, manager, agency, employee or other person, the rehabilitator may pursue all appropriate legal remedies on behalf of the insurer, **subject to prior court approval. Upon application of the rehabilitator for authority to pursue legal remedies on behalf of the insurer, and after such notice and hearing as the court may prescribe, the court shall consider the anticipated costs and benefits and shall not approve the pursuit of legal remedies unless the court finds there is a reasonable likelihood that the economic benefits will exceed the costs. The court may impose such conditions on the rehabilitator's pursuit of legal remedies as may contribute to the conservation of the insurer's assets, which conditions may be imposed either at the time approval is given for pursuit of legal remedies or at any later time.**

4. If the rehabilitator determines that reorganization, consolidation, conversion, reinsurance, merger or other transformation of the insurer is appropriate, he shall prepare a plan to effect such changes **and file the plan with the court within ninety days of the order of rehabilitation.** Upon application of the rehabilitator for approval of the plan, and after such notice and hearings as the court may prescribe, the court may either approve or disapprove the plan proposed, or may modify it and approve it as modified. Any plan approved under this section shall be, in the judgment of the court, fair and equitable to all parties concerned. If the plan is approved, the rehabilitator shall carry out the plan. In the case of a life insurer, the plan proposed may include the imposition of liens upon the policies of the company, if all rights of shareholders are first relinquished. A plan for a life insurer may also propose imposition of a moratorium upon loan and cash surrender rights under policies, for such period and to such an extent as may be necessary.

5. The rehabilitator shall have all powers provided by law to avoid fraudulent transfers.

6. The rehabilitator, with the approval of the court, may appoint an advisory committee of policyholders, claimants, or other creditors should such a committee be deemed necessary. Such committee shall serve at the pleasure of the rehabilitator and shall serve without compensation other than reimbursement for reasonable travel and other expenses. No other committee of any nature shall be appointed by the rehabilitator or the court in rehabilitation proceedings conducted

under this section.

7. No attorney other than the attorney general may appear in behalf of the rehabilitator in the court of appeals or in the supreme court.

8. The state auditor may audit the accounts and performance of the rehabilitator annually. If the state auditor conducts an audit, he or she shall report to the court as soon as possible the result of his or her findings.

375.1176. 1. An order to liquidate the business of a domestic insurer shall appoint the director and his successors as liquidator and shall direct the liquidator forthwith to take immediate possession of the assets of the insurer and to administer them subject to the supervision of the court until the liquidator is discharged by the court. The liquidation of any insurer shall be considered to be the business of insurance for purposes of application of any law of this state. The liquidator shall be vested by operation of law with the title to all of the property, contracts and rights of action, and all of the books and records of the insurer ordered liquidated, wherever located, as of the entry of the order of liquidation. The order shall require the liquidator to take immediate possession of and to secure all of the records and property of the insurer wherever it is located, and to take all measures necessary to preserve the integrity of the insurer's records. The filing or recording of the order with the clerk of the court and the recorder of deeds of the county in which its principal office or place of business is located or, in the case of real estate, with the recorder of deeds of the county where the property is located, shall impart the same notice as a deed, bill of sale or other evidence of title duly filed or recorded with that recorder of deeds would have imparted.

2. With the approval of the court, the director as liquidator may appoint a special deputy or deputies to act for him under sections 375.1175 to 375.1230. The special deputy shall not be an employee of the department of insurance **and shall not be anyone who served as a special deputy rehabilitator for the same insurer.** The special deputy shall have all powers of the liquidator granted by sections 375.1175 to 375.1230. The special deputy shall administer and liquidate the insolvent insurer subject to the general supervision of the director and the specific supervision of the court as provided in sections 375.1175 to 375.1230.

3. Upon issuance of the order of liquidation, the rights and liabilities of any such insurer and of its creditors, policyholders, shareholders, members and any other persons interested in its estate shall become fixed and the termination of any period fixed by any statute of limitations provided by law shall be suspended as of the date of entry of the order of liquidation, except as provided in sections 375.1178, 375.1206 and 375.1210. Rights of shareholders provided by any law other than as provided by sections 375.1150 to 375.1246 shall be suspended upon issuance of the order of liquidation.

4. An order to liquidate the business of an alien insurer domiciled in this state shall be in the same terms and have the same legal effect as an order to liquidate a domestic insurer, except

that the assets and the business in the United States shall be the only assets and business included therein.

5. At the time of petitioning for an order of liquidation, or at any time thereafter, the director, after making determination of an insurer's insolvency, may petition the court for a judicial declaration of such insolvency. After providing such notice and hearing as it deems proper, the court may make the declaration.

6. (1) Any order issued under this section shall require periodic financial reports to the court by the liquidator. Financial reports shall include, at a minimum, the assets and liabilities of the insurer and all funds received or disbursed by the liquidator during the current period. Financial reports shall be filed within one year of the liquidation order and at least annually thereafter.

(2) After an order of liquidation has been entered, the liquidator of such insurer shall file with the director a statement which shall reflect the claims reserves, including losses incurred but not reported, and unearned premium reserves which have been established by the liquidator and which shall also set forth the amounts of such reserves that are allocable to particular reinsurers of the insolvent company. A similar statement shall be filed by each liquidator not less frequently than annually and shall be considered for all intents and purposes as the annual statement which was required to be filed by the insurer with the director prior to the liquidation proceedings. To the extent that any reinsurer of an insurer in liquidation would have been required under any agreement pertaining to reinsurance to post letters of credit or other security prior to an order of liquidation to cover such reserves reflected upon a statement filed with a regulatory authority, such reinsurer shall be required to post letters of credit or other security to cover such reserves after an insurer has been placed in liquidation. If a reinsurer shall fail to post letters of credit or other security required by a reinsurance agreement or the provisions of this section, the director may issue an order barring such reinsurer from thereafter reinsuring any insurer which is incorporated under the laws of the state of Missouri.

7. (1) Within five days after the initiation of an appeal of an order of liquidation, the liquidator shall present for the court's approval a plan for the continued performance of the defendant company's policy claims obligations, including the duty to defend insureds under liability insurance policies, during the pendency of an appeal. Such plan shall provide for the continued performance and payment of policy claims obligations in the normal course of events, notwithstanding the grounds alleged in support of the order of liquidation including the ground of insolvency. In the event the defendant company's financial condition, in the judgment of the liquidator, will not support the full performance of all policy claims obligations during the appeal pendency period, the plan may prefer the claims of certain policyholders and claimants over creditors and interested parties as well as other policyholders and claimants, as the liquidator finds to be fair and equitable considering the relative circumstances of such policyholders and

claimants. The court shall examine the plan submitted by the liquidator and if it finds the plan to be in the best interests of the parties, the court shall approve the plan. No action shall lie against the liquidator or any of his deputies, agents, clerks, assistants or attorneys by any party based on preference in an appeal pendency plan approved by the court.

(2) The appeal pendency plan shall not supersede or affect the obligations of any insurance guaranty association.

(3) Any such plans shall provide for equitable adjustments to be made by the liquidator to any distributions of assets to guaranty associations, in the event that the liquidator pays claims from assets of the estate, which would otherwise be the obligations of any particular guaranty association but for the appeal of the order of liquidation, such that all guaranty associations equally benefit on a pro rata basis from the assets of the estate. Further, in the event an order of liquidation is set aside upon any appeal, the company shall not be released from delinquency proceedings unless and until all funds advanced by any guaranty association, including reasonable allocated loss adjustment expenses in connection therewith relating to obligations of the company, shall be repaid in full, together with interest at the judgment rate of interest or unless an arrangement for repayment thereof has been made with the consent of all applicable guaranty associations.

8. Any person who shall knowingly destroy, conceal, convert or alter any records or property of an insurer after entry of an order of liquidation, without having received prior written permission of the liquidator or of the court, or who shall knowingly neglect or refuse, upon the order or demand of the liquidator, to deliver to the liquidator any records or property of an insurer in his possession or control, shall be guilty of a class C felony.

375.1182. 1. The liquidator shall have the power:

(1) To employ employees and agents, legal counsel, actuaries, accountants, appraisers, consultants and such other personnel as he may deem necessary to assist in the liquidation, **except that no person shall be employed by the liquidator who is related within the second degree by blood or by marriage to the liquidator, special deputy liquidator, or to any employee of a law firm, consultant or other person receiving fees or other income from the insurer's assets;**

(2) To fix the reasonable compensation of employees and agents, legal counsel, actuaries, accountants, appraisers and consultants with the approval of the court;

(3) To pay reasonable compensation to persons appointed and to defray from the funds or assets of the insurer all expenses of taking possession of, conserving, conducting, liquidating, disposing of, or otherwise dealing with the business and property of the insurer. In the event that the property of the insurer does not contain sufficient cash or liquid assets to defray the costs incurred, the director may advance the costs so incurred out of funds appropriated for that purpose. Any amounts so advanced for expenses of administration shall be repaid to the director

out of the first available moneys of the insurer and such funds repaid shall be transferred by the director to the state treasurer for deposit to the general revenue fund;

(4) To hold hearings, to subpoena witnesses to compel their attendance, to administer oaths, to examine any persons under oath, and to compel any person to subscribe to his testimony after it has been correctly reduced to writing; and in connection therewith to require the production of any books, papers, records or other documents which he deems relevant to the inquiry;

(5) To audit the books and records of all agents of the insurer insofar as those records relate to the business activities of the insurer;

(6) To collect all debts and moneys due and claims belonging to the insurer, wherever located, and for this purpose:

(a) To institute timely action in other jurisdictions, in order to forestall garnishment and attachment proceedings against such debts;

(b) To do such other acts as are necessary or expedient to collect, conserve or protect its assets or property, including the power to sell, compound, compromise or assign debts for purposes of collection upon such terms and conditions as he deems best; and

(c) To pursue any creditor's remedies available to enforce his claims;

(7) To conduct public and private sales of the property of the insurer;

(8) To use assets of the estate of an insurer under a liquidation order to transfer policy obligations to a solvent assuming insurer, if the transfer can be arranged without prejudice to applicable priorities under section 375.1218;

(9) To acquire, hypothecate, encumber, lease, improve, sell, transfer, abandon or otherwise dispose of or deal with, any property of the insurer at its market value or upon such terms and conditions as are fair and reasonable. He shall also have power to execute, acknowledge and deliver any and all deeds;

(10) To borrow money on the security of the insurer's assets or without security and to execute and deliver all documents necessary to that transaction for the purpose of facilitating the liquidation. Any such funds borrowed may be repaid as an administrative expense and have priority over any other claims in class 1 under the priority of distribution;

(11) To enter into such contracts as are necessary to carry out the order to liquidate, and to affirm or disavow any contracts to which the insurer is a party;

(12) To continue to prosecute and to institute in the name of the insurer or in his own name any and all suits and other legal proceedings, in this state or elsewhere, and, with the approval of the supervising court, to abandon the prosecution of claims he deems unprofitable to pursue further. If the insurer is dissolved under section 375.1180, he shall have the power to apply to any court in this state or elsewhere for leave to substitute himself for the insurer as plaintiff;

(13) To prosecute any action which may exist on behalf of the creditors, members, policyholders or shareholders of the insurer against any officer of the insurer, or any other person;

(14) To institute proceedings in the same case for receivership for any organization or corporation having the exclusive or dominant right to manage or control the insurer which is the subject of the main case, when it appears that a receiver is necessary for the preservation of the assets of the insurer or that a receiver is necessary to determine the assets of the insurer held by the organization or corporation. The duration of the receivership and the duties of the receiver shall be in the discretion of the court;

(15) To remove any or all records and property of the insurer to the offices of the director or to such other place as may be convenient for the purposes of efficient and orderly execution of the liquidation. Guaranty associations and foreign guaranty associations shall have such reasonable access to the records of the insurer as is necessary for them to carry out their legal obligations;

(16) To deposit in one or more banks in this state such sums as are required for meeting current administration expenses and dividend distributions and to invest all sums not currently needed, unless the court orders otherwise; provided that, at the election of the supervising court, funds held by the liquidator of the insurer's estate shall be deposited and invested by the liquidator pursuant to either of the following standards as the court shall order:

(a) The standards specified by law for the deposit and investment of state funds by the state treasurer, as such standards are determined to be applicable by the court;

(b) The standards specified by law for the investment of money and property of the Missouri state employees' retirement system, as such standards are determined to be applicable by the court;

(17) To file any necessary documents for record in the office of any recorder of deeds or other office in this state or elsewhere where property of the insurer is located;

(18) To assert all defenses available to the insurer as against third persons, including statutes of limitation, statutes of frauds, and the defense of usury. A waiver of any defense by the insurer after a petition in liquidation has been filed shall not bind the liquidator. Whenever a guaranty association or foreign guaranty association has an obligation to defend any suit, the liquidator shall give precedence to such obligation and may defend only in the absence of a defense by such guaranty associations;

(19) To exercise and enforce all the rights, remedies, and powers of any creditor, shareholder, policyholder or member, including any power to avoid any transfer or lien that may be given by the general law and that is not included [with] **within** sections 375.1192 to 375.1195, except for any right of distribution pursuant to section 375.1218;

(20) To intervene in any proceeding wherever instituted that might lead to the appointment of a receiver or trustee, and to act as the receiver or trustee whenever the

appointment is offered;

(21) To enter into agreements with any receiver or director of any other state relating to the rehabilitation, liquidation, conservation or dissolution of an insurer doing business in both states; and

(22) To exercise all powers now held or hereafter conferred upon receivers by the laws of this state not inconsistent with the provisions of sections 375.1150 to 375.1246.

2. (1) If an insurer being liquidated issued liability policies on a claims-made basis, which provided an option to purchase an extended period to report claims, then the liquidator may make available to holders of such policies, for a charge, an extended period to report claims as stated herein. The extended reporting period shall be made available only to those insureds who have not secured substitute coverage. The extended period made available by the liquidator shall begin upon termination of any extended period to report claims in the basic policy and shall end at the earlier of the final date for filing of claims in the liquidation proceeding or eighteen months from the entry of the order of liquidation.

(2) The extended period to report claims made available by the liquidator shall be subject to the terms of the policy to which it relates. The liquidator shall make available such extended period within sixty days after the order of liquidation at a charge to be determined by the liquidator subject to approval of the court. Such offer shall be deemed rejected unless the offer is accepted in writing and the charge is paid within ninety days after the order of liquidation. No commissions, premium taxes, assessments or other fees shall be due on the charges paid by policyholders pertaining to the extended period to report claims.

3. The enumeration in this section of the powers and authority of the liquidator shall not be construed as a limitation upon him, nor shall it exclude in any manner his right to do such other acts not herein specifically enumerated, or otherwise provided for, as may be necessary or appropriate for the accomplishment of or in aid of the purpose of liquidation.

4. Notwithstanding the powers of the liquidator as stated in this section, the liquidator shall have no obligation to defend claims or to continue to defend claims subsequent to the discharge of the liquidator.

5. The director as liquidator, any special deputy, all employees, agents and attorneys of the liquidator and the special deputy, and all employees of the state of Missouri when acting with respect to the liquidation shall be considered to be officers of the court when acting in such capacities and as such shall be subject to the orders and directions of the court with respect to their actions or omissions in connection with the liquidation. The liquidator, special deputy, commissioners and referees appointed by the court, the agents, attorneys and employees of the liquidator and employees of the state of Missouri when acting with respect to the liquidation shall enjoy absolute judicial immunity and be immune from any claim against them personally for any act or omission committed in the performance of their functions and duties in connection with the

liquidation.

6. Notwithstanding the provisions of section 375.1158, subdivision (16) of subsection 1 of this section shall apply to and govern delinquency proceedings commenced before and after August 28, 1991.

7. No attorney other than the attorney general may appear in behalf of the liquidator in the court of appeals or in the supreme court.

8. The state auditor may audit the accounts and performance of the liquidator annually and shall report to the court as soon as possible the result of his or her findings.

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